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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CITY OF PHILADELPHIA; ROBERT W. CRAWFORD, COMMISSIONER, DEPARTMENT OF RECREATION OF THE CITY OF PHILADELPHIA; NATHANIEL WASHINGTON, ACTING COMMISSIONER, DEPARTMENT OF RECREATION OF THE CITY OF PHILADELPHIA,
Petitioners

v.

MICHAEL TACYNEC, JAMES MCDONALD AND NORTHEAST PHILADELPHIA STRING BAND, INC.
and
RUSSELL J. GEISER AND SOUTH JERSEY STRING BAND, INC.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Are the Rules of the City of Philadelphia limiting the number of participants in its annual New Year's Day Mummers' Parade violative of the First and Fourteenth Amendment rights of the Respondents who were excluded from the Parade, where the Rules are content-neutral, serve a legitimate and substantial governmental interest, and do not affect Respondents' rights of expression at any other time, place, or manner?

LIST OF ALL PARTIES TO PROCEEDING

Petitioners

City of Philadelphia

Robert W. Crawford, Commissioner, Department of Recreation of the City of Philadelphia

Nathaniel Washington, Acting Commissioner, Department of Recreation of the City of Philadelphia

Respondents

Michael Tacynec

James McDonald

Northeast Philadelphia String Band, Inc.

-and-

Russell J. Geiser

South Jersey String Band, Inc.

TABLE OF CONTENTS

Page

Question Presented for Review i

List of All Parties to Proceeding ii

Opinions Below 1

Statement of Jurisdiction 2

Text of Constitutional Provisions Involved 2

Statement of the Case 3

Reason for Granting the Writ:

The Decision of the Court of Appeals Effectively Precludes the City of Philadelphia From Limiting the Number of Participants in its New Year's Day Mummers' Parade Even Though the City's Rules Are Content-Neutral and Serve a Legitimate and Substantial Governmental Interest and Do Not Regulate Expression At Any Other Time, Place, or Manner. The Decision of the Court of Appeals Is Therefore In Direct Conflict With Numerous Decisions of This Court. . 6

Conclusion 12

Cases Cited:

Avins v. Rutgers, the State University of New Jersey, 385 F.2d 151 (3d Cir. 1967); *certiorari denied*, 390 U.S. 920 (1968) 10, 11

Consolidated Edison Company v. Public Service Commission, 447 U.S. 530 (1980) 8

Cox v. New Hampshire, 312 U.S. 569 (1941) .. 10, 11

Hague v. Committee for Industrial Organization, 307 U.S. 496 (1938) 11

TABLE OF CONTENTS—(Continued)

Cases Cited: *Page*

Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981) 7, 8, 9, 11

Northeast Philadelphia String Band, Inc., et al. v. City of Philadelphia, et al., Nos. 80-3503 and 81-2249, Opinion dated November 4, 1981 (E.D. Pa. 1981); *reversed and remanded sub. nom., Tacynec, et al. v. City of Philadelphia, et al.*, 687 F.2d 793 (3d Cir. 1982) 4, 7

Tacynec, et al. v. City of Philadelphia, et al., 687 F.2d 793 (3d Cir. 1982) 3, 4, 7

Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) 8

We've Carried the Rich for 200 Years, Let's Get Them Off Our Backs — July 4th Coalition v. City of Philadelphia, 414 F.Supp. 611 (E.D. Pa. 1976); *affirmed*, 538 F.2d 322 (3d Cir. 1976) 12

United States Constitution Cited:

Amendment I 2

Amendment XIV 2

United States Code Cited:

28 U.S.C. §1254(1) 2

TABLE OF CONTENTS—(Continued)

APPENDIX

Page

Memorandum Opinion of Judge Green, U.S. District Court, Eastern District of Pennsylvania, Dated November 5, 1981 ..... A-1

Order of Judge Green, U.S. District Court, Eastern District of Pennsylvania, Dated November 5, 1981 ..... A-6

Opinion of the United States Court of Appeals for the Third Circuit, Dated September 2, 1982, and reported at 687 F.2d 793 (1982) A-7

Judgment of the United States Court of Appeals for the Third Circuit, Dated September 2, 1982 A-22

IN THE

SUPREME COURT OF THE UNITED STATES

CITY OF PHILADELPHIA; ROBERT W. CRAWFORD, COMMISSIONER, DEPARTMENT OF RECREATION OF THE CITY OF PHILADELPHIA; NATHANIEL WASHINGTON, ACTING COMMISSIONER, DEPARTMENT OF RECREATION OF THE CITY OF PHILADELPHIA,

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MICHAEL TACYNEC, JAMES MCDONALD AND NORTHEAST PHILADELPHIA STRING BAND, INC. AND RUSSELL J. GEISER AND SOUTH JERSEY STRING BAND, INC.,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit was filed September 2, 1982, and is reported at 687 F.2d 793 (3rd Cir. 1982). The Opinion of the United States District Court for the Eastern District of Pennsylvania was filed November 5, 1981, and is not officially reported. Copies of both Opinions appear in the Appendix at p. A-1 and p. A-7.

STATEMENT OF JURISDICTION

Judgment was entered in the United States District Court for the Eastern District of Pennsylvania against Petitioners on November 5, 1981. This Judgment was reversed and remanded to the District Court by the United States Court of Appeals for the Third Circuit by Opinion dated September 2, 1982.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

TEXT OF CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section I:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Broad Street, in the heart of the City of Philadelphia, Pennsylvania ("City"), is the site of an annual parade on New Year's Day, January 1, called the Mummers' Parade, which the Court of Appeals referred to, correctly, as "One of Philadelphia's well-established traditions." (Appendix, p. A-9). In an effort to limit the Parade to the daylight hours of New Year's Day and thereby avoid serious safety and traffic hazards in the City caused by the extension of the Parade into the night, the City has adopted rules which limit the length of the Parade by restricting the number of participants, and which provide for new participants to be selected by lottery in the event of a vacancy or disqualification.[1]

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1. The rules challenged by Respondents are fully set forth as follows:

Rules Governing Participating Organizations in the 1982 Mummers Parade.

1. Participation in the 1982 Mummers Parade shall be limited as follows:

(a) The number of string bands shall be limited to 23.
(b) The number of fancy clubs shall be limited to 4.
(c) The number of brigades shall be limited to 20.
(d) The number of comic clubs shall be limited to 5.

2. Each string band, fancy club, brigade and comic club which marched in the 1980 New Year's Day Parade shall be eligible to march in the 1982 parade provided that it submits to the Department of Recreation not later than August 31, 1981, a statement by an authorized person that it is able to comply with all the requirements for participation set forth in the rules for its division.

3. Notwithstanding paragraph 2 above, no string band, fancy club, brigade or comic club will be automatically eligible if it has been disqualified by the judges for the two preceding years.

4. In the event that fewer than 23 string bands, 4 fancy clubs, 20 brigades or 5 comic clubs are deemed eligible to participate by the Department of Recreation after August 31, 1981, any open slot shall be filled by lottery.

Respondents, who are two string band organizations and the individual members of those organizations, have been precluded from marching in the Mummers' Parade as the Northeast and South Jersey String Bands, because there were no vacancies in the 23 allotted positions for string bands, under Rule 1(a). They brought this action to gain access to the Parade on the grounds that their First and Fourteenth Amendment rights of expression were violated by the City's rules limiting participation in the Parade to 23 string bands.

Although the District Court found that the rules were both content-neutral and served a significant governmental interest, it granted Respondents' request for a preliminary injunction permitting their participation in the Parade on the ground that the City's rules were not "the least restrictive means of accomplishing the valid governmental interest" (Appendix, p. A-5) of limiting the length of the Parade.

The City appealed the District Court's Judgment to the United States Court of Appeals for the Third Circuit. The Court of Appeals, in an opinion by Judge Arlin M. Adams, filed September 2, 1982, vacated the Judgment of the District Court and remanded the case for further proceedings.

The Court of Appeals, affirming the District Court's conclusion that the City's Parade rules were content-neutral and served a significant governmental interest, held that the District Court had erred in judging the City's rules by the "least restrictive means" analysis. The Appeals Court, therefore, remanded the case for a determination of whether the Respondents have an "adequate alternative forum" given the size of the audience, the prestige of an alternative parade, and the relative ability of another audience to appreciate the plaintiffs' expressive message. Through its instruction on remand, the Court of Appeals concluded that Philadelphia's rules limiting the length of its Mummers' Parade are valid only if 1) the rules are content-neutral; 2) the rules serve

a substantial governmental interest; and 3) the Respondents, who are thereby not permitted to participate, have an *equivalent* forum elsewhere in terms of prestige and audience size and sophistication. Thus, assuming the District Court was correct in its conclusion that "The Mummers' Parade is the unique day of the year for mummery," (Appendix, p. A-5), it is almost a foregone conclusion that the District Court will find that no adequate alternative exists. Accordingly, under the standard set forth by the Court of Appeals, there is a virtual bar to *any* regulations by the City of the length of its Parade or the number of participants.

The grant of the Writ of Certiorari is thus appropriate at this time in order to avoid the needless expenditure of judicial time and resources that would be necessitated by a remand. Since the Court of Appeals has remanded the case for consideration in the District Court under an incorrect legal standard, such remand would be a pointless review. Moreover, since the outcome of the District's Court's reconsideration is virtually a foregone conclusion, based on the required application of an incorrect legal standard to facts previously determined there, it is inevitable that this case will again be before this Court, on Petition for Writ of Certiorari, where the legal issue will be the same as that now presented.

Accordingly, the City files this Petition for a Writ of Certiorari urging this Court to review and reverse the Opinion and Order of the Court of Appeals.

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS EFFECTIVELY PRECLUDES THE CITY OF PHILADELPHIA FROM LIMITING THE NUMBER OF PARTICIPANTS IN ITS NEW YEAR'S DAY MUMMERS' PARADE EVEN THOUGH THE CITY'S RULES ARE CONTENT-NEUTRAL AND SERVE A LEGITIMATE AND SUBSTANTIAL GOVERNMENTAL INTEREST, AND DO NOT REGULATE OR LIMIT THE RIGHTS OF RESPONDENTS TO PERFORM AT ANY OTHER TIME, PLACE, OR MANNER. THE DECISION OF THE COURT OF APPEALS IS THEREFORE IN DIRECT CONFLICT WITH NUMEROUS DECISIONS OF THIS COURT.

On New Year's Day, January 1, of each year, the City of Philadelphia is host of an annual Mummers' Parade on Broad Street, one of the main thoroughfares of the City, involving thousands of participants and hundred of thousands of viewers, who watch the Parade both live and on television.

In an effort to control the public safety problems that arose because of the extension of the Parade throughout the entire day and into the night, the City developed rules designed to limit the number of participants in the Parade, to keep the Parade to a manageable length, so that it could be concluded during the daylight hours. These rules, in their present form, limit the number of participating organizations, and establish a lottery system for filling vacancies as they occur.[2] Because there were no vacancies in the string band section of the Parade, Respondents, who are two string bands and individual members, instituted this litigation seeking to invalidate the rules insofar as they limit participation in the Parade to 23 string bands as violative of their First and Fourteenth Amendment rights.

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2. The rules challenged by Respondents are fully set forth at footnote 1, page 3, supra.

Although the Court of Appeals agreed with the District Court that the City's rules are content-neutral and serve a legitimate and substantial governmental interest, the Court of Appeals concluded that the rules are valid only if, in addition, the Respondents have an "adequate alternative forum" considering factors:

> "such as the size of the audience, the prestige of an alternative parade, and the relative ability of another audience to appreciate plaintiffs' expressive message." (Appendix, p. A-16).

Should the District Court conclude on remand, consistent with its earlier finding, that "The Mummers' Parade is the unique day of the year for mummery" (Appendix, p. A-5), *i.e.*, that the New Year's Day audience is the largest, that the Parade is the most prestigious for mummers, and that the audience is the most appreciative, then pursuant to the direction of the Court of Appeals it must invalidate the City's rules which put a limit on the number of participants in the parade and thereby limit its size and length.

The Court of Appeals erred in directing the lower Court to undertake such an examination, for no holding of this Court even remotely suggests that the City is precluded from imposing reasonable time, place, and manner restrictions on this Parade simply because it is the best of its kind. Yet, under the direction of the Court of Appeals, if the District Court finds that no other parade or event in the City offers the *same degree* of prestige and exposure, the City will be barred, on First Amendment grounds, from denying participation in the Mummers' Parade to any group or individual who wishes to participate.[3]

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3. The invalidation of the City's rules on "adequate alternative forum" grounds would make *any* limitation on participation impossible. This Court's decision in *Heffron v. International Society for Kirshna Consciousness*, 452 U.S. 640 (1981), recognizes that it is improper to focus only upon the "incidental effect" on Respondents.

By using the Mummers' Parade itself as the standard against which alternatives must be judged, the Court of Appeals has made it almost impossible to find anything other than another New Year's Day Mummers' Parade to be an adequate alternative forum. Thus, the Appeals Court has effectively granted Respondents the right to march in a particular place, at a particular time, and in a particular manner. This Court has never previously mandated such a result. Rather, reasonable time, place, and manner restrictions on First Amendment activity have been consistently approved so long as they are content-neutral, serve a significant government interest, and "leave open ample alternative channels for communication of the information." *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 648 (1981), citing, *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976); *Consolidated Edison Co. v. Public Service Comm'n.*, 447 U.S. 530, 535 (1980). Thus, the focus for judicial scrutiny should be the burdens imposed by the City's regulations on Respondents' ability to communicate their message in alternative forums, *not* on whether or not there is an equivalent Mummers' Parade in Philadelphia.

In focusing on the nature of the forum rather than on the City-imposed burdens, if any, on the Respondents' right of free expression, and in directing the inquiry at the uniqueness of the Mummers' Parade itself, the Court of Appeals seems to have gone far beyond this Court's relatively clear standard by which such First Amendment regulation is to be judged.

NOTE 3 — *(Continued)*

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since invalidation of the rules must necessarily apply to all "similarly situated groups". This Court must recognize that by virtue of the Court of Appeals decision, the City would be prohibited from achieving its legitimate governmental interest of monitoring crowd safety on New Year's Day, and would be unable to regulate a potentially infinite expansion of the size and length of the parade. See *Heffron*, *supra*, at 654.

In *Heffron, supra*, this Court refused to invalidate a rule which had as its effect the exclusion of a Krishna organization (ISKCON) from a booth at the Minnesota State Fair. In upholding the State Fair rule allocating booths as a valid time, place, and manner restriction, the Court held that since the State Fair rule only applied to the Fair itself, it could not be invalidated on the ground that the State had failed to *provide* an alternative forum. Rather the question to be resolved under First Amendment challenge was whether the rule *precluded* ISKCON's use of alternative forums:

> For Rule 6.05 to be valid as a place and manner restriction, it must also be sufficiently clear that alternative forums for the expression of respondents' protected speech exist despite the effects of the Rule. Rule 6.05 is not vulnerable on this ground. First, the Rule does not prevent ISKCON from practicing Sankirtan anywhere outside the fairgrounds.

Id. at 654-655.

Like the rule in *Heffron*, the rules promulgated by the City do not prohibit the Respondents or their members from performing elsewhere in the City. Indeed, the record in the District Court is clear that the Respondents regularly meet to play their music and have given numerous performances throughout the year at locations throughout the City and surrounding communities. Further, the individual Respondents were not denied access to the Parade, as they had been members of other bands and had participated in the Parade in earlier years as members of those bands. Additionally, the Respondents are not prevented by the rules from participating in other parades or events in the City of Philadelphia. Furthermore, should a currently participating string band choose not to participate in the Parade or in the event such a string band is disqualified, the Respondent bands

will have the opportunity to participate in the Parade if successful in the lottery established under the City's Rule 4 (see footnote 1, at p. 3, *supra*.)

There is no holding of this Court which even suggests that the *uniqueness* of a particular fair, parade, or other event, is sufficient to preclude any regulation which might exclude a prospective participant. Such a rule — effectively that set forth by the Court of Appeals — places an intolerable burden upon the government. It ignores the fact that limiting the Parade to daylight hours is a "legitimate, governmental concern." See, *Avins v. Rutgers, State Univ. of New Jersey*, 385 F.2d 151 (3d Cir. 1967), *cert. den.*, 390 U.S. 920 (1968) (First Amendment does not require that law review of state university provide space for every author who submits publication material); *We've Carried the Rich for 200 Years Let's Get Them Off Our Backs — July 4th Coalition v. City of Philadelphia*, 414 F.Supp. 611 (E.D. Pa. 1976), *aff'd.*, 538 F.2d 322 (3d Cir. 1976) (Denial of parade permit does not violate First Amendment where alternative route is permitted). Under such a rule, should 2, 20, 200, or 2000 additional bands desire to participate in the Mummers' Parade, the City would be obliged to include them all. To require the City to make the Parade such an unlimited forum is to ignore the enormity of the problems confronting City officials administering the Parade and totally disregards the decisions of this Court which recognize that *some* regulation must be permitted. In *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941), a unanimous Court held:

> "If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place, and manner in relation to the other proper use of the streets."

The result produced by the Court of Appeals' mandate here is inconsistent with this well-recognized acknowledgement of municipal authority. "The right to freedom of speech does not open every avenue to one who desires to use a particular outlet for expression." *Avins, supra,* at 153.

The decision of the Court of Appeals may eliminate the possibility of any limitation on the length of this Parade because of its requirement that any alternative forum be judged against the Parade itself. The criteria set out by the Court of Appeals injects a totally new and injurious standard into the delicate balancing process between individual First Amendment rights and the rights of a municipality to promulgate reasonable time, place and manner regulations for the protection of all citizens. Thus, the Opinion of the Court of Appeals directly conflicts with the Court's decision in *Heffron, supra, Cox, supra,* and accordingly with this Court's traditional First Amendment analysis which has permitted such regulation.

> "[T]he privilege of a citizen of the United States to use the streets and parks . . . may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order, but it must not, in the guise of regulation, be abridged or denied."

Hague v. Committee for Industrial Organization, et al., 307 U.S. 496, 515-516 (1938). Since the decision of the Court of Appeals precludes such legitimate regulation, that decision is constitutionally infirm and must be reversed.

CONCLUSION

The Court of Appeals erred to the extent that it required an *equivalent* forum for the Respondents when factors such as the size of the audience which watches the Philadelphia New Year's Day Mummers' Parade, the prestige of other parades, and the ability of other audiences to appreciate Respondents' performance are considered. Those factors are irrelevant to the validity of the City's rules which place a limit on the length of a particular parade, on a particular date, and do not limit in any way Respondents' expression at any other time, place, or manner. Since the Parade rules are content-neutral and serve a substantial governmental interest, and because the rules do not preclude Respondents' use of other forums, the rules should not be invalidated under the First or Fourteenth Amendments.

For the reasons stated above, a Writ of Certiorari should issue to review the Judgment and the Opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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